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No. 99-1426

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Petitioners,

vs.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE AMERICAN BOILER MANUFACTURERS ASSOCIATION SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

The American Boiler Manufacturers Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in the above-referenced case. The consent of the attorney for Respondent and all Petitioners except one have been obtained. Amicus has attempted but has been unsuccessful in reaching attorney of record for Citizens for Balanced Transportation, et al. Amicus has obtained the consent of the attorney for several individuals who have joined that brief, but has not obtained consent of the counsel of record. Accordingly, the American Boiler Manufacturers Association hereby moves for leave to file the attached brief *amicus curiae*.

The American Boiler Manufacturers Association ("ABMA") represents the manufacturers of commercial, industrial and utility steam generating and fuel burning equipment, as well as suppliers to the industry. ABMA promotes the common business interests of the boiler manufacturing industry and the safe, environmentally friendly use of the products and services of its members. ABMA serves to generate support in state and federal governments for industry concerns, while also informing the public of vitality, environmental consciousness and high-tech orientation of the boiler industry.

Participating as *amicus curiae*, ABMA hopes to aid the Court in its consideration of the writ of certiorari by providing insight into the complexities of setting environmental standards and the need for full consideration of all factors bearing on these decisions.

Respectfully Submitted,

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	3
Conclusion	16

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

American Trucking Ass'n, Inc. v. EPA, 175 F.3d 1027 modified, 195 F.3d 4 (1999) 4,8

Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) 4,5,8,9

Lead Indus. Ass'n v. EPA, 647 F.2d 1130(D.C. Cir. 1980) . . . . . *passim*

Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) 13,14

State of Michigan v. EPA, No. 98-1497 2000 U.S. App. LEXIS 3209 (D.C. Cir., March 3, 2000) 3,10,11,13,14

FEDERAL STATUTES

CLEAN AIR ACT § 101(b)(1), 42 U.S.C. § 7401(b)(1) 4
CLEAN AIR ACT § 108, 42 U.S.C. § 7408 3,4,14

CLEAN AIR ACT § 109, 42 U.S.C. § 7409 3,4,5,16
CLEAN AIR ACT § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D) 11,12,14

FEDERAL REGULATIONS

62 Fed. Reg. 38,856, 38,883 (July 18, 1997) 6
63 Fed. Reg. 57,356 (Oct. 27, 1998) 10,11

MISCELLANEOUS

Oxford Concise English Dictionary (9th ed. 1995) 4

RICHARD B. BELZER, *The Peril and Promise of Risk Assessment*, REGULATION (Fall 1991) at 40 6

KEVIN L. FAST, *Treating Uncertainty as Risk: The Next Step in the Evolution of Environmental Regulation*, 26 ELR 10627 (December 1996) 6

MARK E. SHERE, *The Myth of Meaningful Environmental Risk Assessment*, 19 HARVARD ENVTL. L. REV. 409 (1995). 6

WENDY E. WAGNER, *The Science Charade in Toxic Risk Regulation*, 95 COLUMBIA L. REV. 1613 (NOVEMBER 1995). 6

CENTER FOR RISK ANALYSIS, HARVARD SCHOOL OF PUBLIC HEALTH, A HISTORICAL PERSPECTIVE ON RISK ASSESSMENT IN THE FEDERAL GOVERNMENT, (MARCH 1994). 6

RHYS JENKINS, *Environmental Regulation and International Competitiveness: A Review of Literature and Some European Evidence*, (UNITED NATIONS UNIVERSITY INSTITUTE FOR NEW TECHNOLOGIES, JANUARY 1998)7

U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL AIR QUALITY AND EMISSIONS TRENDS REPORT 1996. . . 7

ROBERT W. CRANDALL, FREDERICK H. RUETER AND WILBUR A. STEGER, *Clearing the Air, EPA's Self-Assessment of Clean Air Policy*, 4 REGULATION 35 (1996) . . . 7

STEPHEN BREYER, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (HARVARD UNIVERSITY PRESS 1993). 8

SHELDON MEYERS, *Applications of De Minimis* IN DE MINIMIS RISK 103 (CHRIS WHIPPLE, ED., 1987). . . 9

MARCH SADOWITZ, *Tailoring Cost-Benefit Analysis to Environmental Policy Goals: Technology-Health-Based Environmental Standards in the Age of Cost-Benefit Analysis*, 2 B.U.J. SCI. & TECH. L. 11 (1996)0

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Respondents.

BRIEF FOR THE AMERICAN BOILER MANUFACTURERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE [1]

The American Boiler Manufacturers Association ("ABMA") is a national non-profit association representing the manufacturers of commercial, industrial and utility steam-generating and fuel-burning equipment, as well as suppliers to

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of amicus curiae American Boiler Manufacturers Association was not authored in whole or in part by counsel for a party, and no person or entity other than the American Boiler Manufacturers Association and its members has made a monetary contribution to the preparation of this brief.

the industry. The primary goal of ABMA is to promote the common business interests of the boiler manufacturing industry and to promote the safe, environmentally friendly use of the products and services of its members. ABMA jointly serves as a vehicle for generating support in the state and federal governments for industry concerns, while also informing the public of the vitality, environmental consciousness and high-tech orientation of the boiler industry.

SUMMARY OF ARGUMENT

The implementation of the federal Clean Air Act, coupled with the increasing efficiencies of industrial energy production, have resulted in a record of ever greater air quality in the United States. While initial gains in air quality were the result of relatively cost-effective control strategies and process changes, more recent regulation has focused on a diminishing range of costly controls. When Congress drafted the Act, they made it clear that economic and technological feasibility was to be an important part of the regulatory decision-making calculus. As society faces diminishing returns regarding its environmental regulations, it is particularly important that appropriate use of cost considerations be an overt, forthright and accurate component of the implementation of the Clean Air Act.

Amicus contends that the U.S. Environmental Protection Agency is already cognizant of its obligation to consider costs in Clean Air Act decisions, despite the anomalous ruling of *Lead Industries Ass'n. v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied* 449 U.S. 1042 (1980). First, the subjective and inaccurate mechanism of risk assessment is used, and cost and technological feasibility figure in to these calculations in inconsistent and unsatisfactory ways. It is

inconceivable that a methodologically flawed procedure such as risk assessment can filter cost and technological data, while such data cannot be utilized by the Agency directly, in the light of day. Second, Amicus observes that the ruling in *Lead Industries* has become increasingly detached from the reality of Agency action in which cost considerations are embraced in a *sub rosa* fashion. As an example, in the recent rulemaking regarding the control of nitrogen oxide, at issue in *State of Michigan v. EPA*, No. 98-1497 2000 U.S. App. LEXIS 3209 (D.C. Cir., March 3, 2000), the operative basis for regulatory action was the threshold at which such action was cost-effective. Despite the Agency histrionics involved in such an opaque use of cost considerations, the D.C. Circuit nevertheless found the underlying use of cost within the discretion of the Agency.

In short, consideration of economic and technological feasibility are an everyday reality in the implementation of the Clean Air Act. Amicus contends that this Court can restore the use of cost and technological factors to a more open environment, consistent with the plain meaning of the Clean Air Act and administrative process.

ARGUMENT

Under § 109 of the Clean Air Act ("CAA"), the Administrator of the Environmental Protection Agency must set national ambient air quality standards ("NAAQS") for ozone that "allow[] an adequate margin of safety" and are "requisite to protect public health." CAA § 109(b), 42 U.S.C. § 7409(b). The Administrator must base the NAAQS on "criteria" reflecting scientific data for public health and welfare. CAA § 108(a), 42 U.S.C. § 7408(a). At the time of setting a NAAQS for a pollutant, the Administrator must also

compile data relating to emission control technologies, installation and operation costs, energy requirements, environmental impacts and alternative methods of emissions control. CAA § 108(b)(1), 42 U.S.C. § 7408(b)(1). The statute therefore requires the Administrator to undertake a significant effort to gather a large amount and wide range of data in the NAAQS-setting process, including economic data.

Construing § 109 in *Lead Industries*, the U.S. Court of Appeals for the D.C. Circuit held that economic or technological factors may not be considered when setting a NAAQS; rather public health alone must govern the decision. *Lead Indus.*, 647 F.2d at 1149. Contrary to this holding of the D.C. Circuit, a fair reading of the law *does not* preclude consideration of the cost and feasibility of adopting one emission standard over another. This position is supported by a plain reading of the statute, other provisions of the statute, and legislative history. These points have been briefed thoroughly by Petitioners in this case, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, modified, 195 F.3d 4 (1999), and Amicus will not elaborate on them.[2]

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[2] One purpose of the Clean Air Act relevant to Amicus perhaps left unaddressed by others briefing this case, is Congress's desire to protect "public health and welfare and the *productive capacity* of its population." CAA § 101(b)(1), 42 U.S.C. § 7410 (emphasis added). Given its plain meaning, the nation's "productive capacity" refers to the "power of" "producing goods." *Oxford Concise English Dictionary* 1092 (9th ed. 1995). Thus, the Act should be read to protect the ability of the nation to produce goods *in tandem with* the public health and welfare. Such an interpretation would be consistent with this Court's earlier acknowledgment of Congress's inherently reasonable approach to regulation: "There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong national economy. *Industrial Union Dept., AFL-CIO v. America Petroleum Inst.*, 448 U.S. 607, 669 n. 6 (1980) ("*Benzene*") (Powell, J., concurring).

Amicus will demonstrate that EPA's own actions, with respect to risk assessment and past Clean Air Act rulemakings, are inconsistent with any blanket rejection of economic consideration. Rather, EPA selectively employs the use of such data, apparently in support of preconceived outcomes. EPA's current *sub rosa* use of economic data is frankly inconsistent with the spirit and purpose of public participation in the rulemaking process as well as the Clean Air Act itself. As the *Lead Industries* court pointed out, promulgating NAAQS "presents complex questions of science, law, and social policy." *Id.* at 1146. Amicus posits that the weight of the science, law and social policy strongly favors the interpretation of § 109 that allows for reasoned consideration of economic and technological feasibility.

I. Risk Assessment, relied on by EPA to set NAAQS, is a fundamentally flawed, uncertain calculus, that must be supplied with all possible supporting documentation including factors now precluded from consideration under *Lead Industries*.

By definition, the selection of an air quality standard to protect public health is an uncertain task. As the D.C. Circuit noted in *Lead Industries*, these decisions often involve the "very frontiers of scientific knowledge" and lack consensus in the scientific community. *Lead Industries*, 647 F.2d at 1160. In an attempt to minimize the guesswork in setting environmental standards, agencies turned to risk assessment, a methodology that purported to rationalize the process. This Court endorsed this practice in *Benzene*; it now serves as the standard basis for setting environment and health standards.

Risk assessment does not eliminate uncertainty, however; it merely substitutes one type of uncertainty for another. It is fair to say that risk assessment can create more uncertainty than it resolves. How to identify a public health "risk," whether it should be diminished or eliminated, and how to achieve that goal through regulation pose virtually intractable dilemmas for Congress, agencies and courts. *See generally*, Richard B. Belzer, *The Peril and Promise of Risk Assessment*, Regulation (Fall 1991) at 40; Kevin L. Fast, *Treating Uncertainty as Risk: The Next Step in the Evolution of Environmental Regulation*, 26 ELR 10627 (December 1996). Even in the rulemaking at issue here, EPA made clear that the standard it adopted "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38,856, 38,883 (July 18, 1997).

Thus, EPA's own process makes the point: risk assessment lacks objectivity, due to its foundation in assumptions and projections. Mark E. Shere, *The Myth of Meaningful Risk Assessment*, 19 Harvard Envtl. L Rev. 409 (1995). See also, Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Columbia L. Rev. 1613 (November 1995). When used to set environmental standards, it has "flaws in current practice, which cause exaggerated risk estimates, [that] are harmful because they cause unnecessary resource expenditures in the public and private sectors." CENTER FOR RISK ANALYSIS, HARVARD SCHOOL OF PUBLIC HEALTH, A HISTORICAL PERSPECTIVE ON RISK ASSESSMENT IN THE FEDERAL GOVERNMENT, (MARCH 1994), at 38.

The crux of Amicus's argument is that EPA has not avoided cost considerations through use of risk assessment. It has merely sublimated the logical desire for cost-beneficial

outcomes into an uncertain process likely to produce unwise and unwelcome results. Amicus believes that if the Clean Air Act is broad enough to encompass risk assessment, surely the statute contemplates more overt and methodologically sound use of cost and technological feasibility data as suggested by Petitioners.

The failure to squarely deal with the fundamental matters of cost and feasibility unjustly "wreaks havoc" on the regulated community. Productivity and continued viability of business depend on certainty. Certainty in the law is the starting point. But it also entails anticipation of what capital expenditures will be necessary two or three years down the road. The ability of U.S. firms to compete internationally is directly affected by the amount and timing of investment needed to keep up with pollution control mandates in the U.S. Rhys Jenkins, *Environmental Regulation and International Competitiveness: A review of Literature and Some European Evidence*, (United Nations University Institute for New Technologies, January 1998) at 19.

According to EPA, the average reduction of ambient concentrations of the six CAA criteria pollutants was 33% from 1987 to 1996. To achieve these reductions, stationary sources invested $9.8 billion in 1987 and $10 billion in 1989 (reported in 1996 dollars).[3] Robert W. Crandall, Frederick H. Rueter and Wilbur A. Steger, *Clearing the Air, EPA's Self-Assessment of Clean Air Policy*, 4 Regulation 35, 45 (1996) (*citing* U.S. Environmental Protection Agency, National Air Quality and Emissions Trends Report 1996).

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[3] These costs cited in the EPA Self-Assessment do not include marginal costs.

Yet, each time standards are tightened, requiring greater controls for narrower gains, sources must consider the marginal cost and technological feasibility of meeting those standards. Achieving even greater reductions "can involve limited technological choice, high cost, devotion of considerable agency resources, large legal fees, and endless argument." Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard University Press 1993) at 11. Further tightening standards through NAAQS revisions increases the need for cost consideration proportionately.

Petitioners in *American Trucking Ass'ns* attempted to distinguish *Lead Industries* from the present case by arguing that *Lead Industries* entailed *setting* an initial NAAQS, while the present case deals with *revising* an existing NAAQS. The court below could "discern no legally relevant difference" that would permit prohibiting cost consideration for setting NAAQS while allowing cost consideration for revising NAAQS. *Id.* at 1040.

Amicus agrees and further can discern no relevant policy difference. Cost and technological feasibility bear on standard setting and revision. However, it is also true that greater reduction requirements compel greater scrutiny of the ability of industry to meet the standards and remain viable. This Court has not historically been blind to such practical realities. In *Benzene,* this Court assessed whether under the Occupational Safety and Health Act an agency could mandate a near zero-tolerance level of benzene in the workplace. A plurality of the Court rejected that outcome, viewing as "unreasonable" an assumption "that Congress intended to give the secretary the unprecedented power over American industry that would result" from that approach. 448 US 607, 645 (U.S.

1980). The plurality of the Court went on to prevent that outcome by reading the limitation "significant risk" into the provision being construed. *Id.*

Of course, in *Benzene* the Court was construing a statute that expressly included a reasonableness standard for setting exposure limits. The Clean Air Act provision before the Court today has no similar express limitation. It strains credulity nonetheless to believe that the universal guidepost of reasonableness does not apply with equal force in the present case.

> "It may be true. . . that the Act as a whole expresses a distinct preference for safety over dollars. But that expression of preference, as I read it, falls far short of the proposition that the Secretary must eliminate marginal or insignificant risks of material harm right down to an industry's breaking point."

Benzene, 448 U.S. at 683 (Rehnquist, concurring).

In essence, risk assessment is a filter through which economic and technological constraints are viewed. It is inconceivable that the Clean Air Act allows for the filter (with all its methodological shortcomings) but makes illegal the consideration of such constraints in a direct and forthright manner.[4]

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[4] Such a result is inconsistent even with EPA's own intentions. *See also*, Sheldon Meyers, *Applications of De Minimis* IN DE MINIMIS RISK 103 (CHRIS WHIPPLE, ED., 1987) (authored by an EPA official, describing economic forces as compelling cost/benefit consideration, explaining that EPA practice includes feasibility and cost consideration in

II. Continued Adherence to *Lead Industries* Ignores the Reality that the Agency Does Consider Costs and Will Lead to *Sub Rosa* Consideration of Costs in Future Rulemakings

In addition to the impacts on the regulated community of continued adherence to *Lead Industries*, it is clear that cost is currently a factor in NAAQS decision-making as a matter of practical and political necessity.[5] Only recently, the D.C. Circuit addressed the issue of NAAQS cost assessment in *State of Michigan v. EPA*, 2000 U.S. App. LEXIS 3209, at *24-*39. This case arose as a challenge to an EPA rule setting statewide emissions limits for nitrogen oxide ("NOx"), to be implemented through NOx limits on stationary sources in state implementation plans ("NOx SIP Rule").[6]

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setting de minimis risk, and suggesting that such agency deliberations should be conducted "in full public view.")

[5] As one commentator has observed, "[i]gnoring the cost implications of the environmental policy has become politically infeasible given the drive for reduced government." March Sadowitz, *Tailoring Cost-Benefit Analysis to Environmental Policy Goals: Technology-Health-Based Environmental Standards in the Age of Cost-Benefit Analysis*, 2 B.U.J. Sci. & Tech. L. 11 (1996) (page references not available).

[6] The NOx SIP rule is closely related to the *ozone* rule being considered here. Ozone is formed by the chemical and physical reaction of NOx and volatile organic compounds ("VOCs"). Therefore, EPA's rule to reduce NOx emissions is a means to reduce ambient *ozone* concentrations. *See, generally*, Finding of Significant Contribution and Rulemaking for certain states in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (EPA final rule to require states to prohibit specific amounts of NOx emissions).

In the NOx SIP Rule, EPA did not on the face of the rulemaking, include in its calculus the cost/benefit analysis of the standard it adopted. Rather, it buried the cost/benefit consideration in a threshold determination of what would be an acceptable level of control. *See, generally*, 63 Fed. Reg. 57356, 57376 (Oct. 27, 1998). There, EPA construed § 110 of the CAA, to determine to what extent some upwind states contribute NOx emissions to other states, causing those downwind states to be in violation of the NAAQS for ozone. EPA did not define what level of NOx emissions contributed to other states that it would consider unacceptable and constitute a CAA violation. Rather, EPA spent months (effectively years) gathering data about NOx emissions from various sources and the cost to each source type to reduce those emissions to a range of levels. Based on that data, EPA calculated the *average* cost per source type to reduce emissions to a range of levels. Then EPA chose an average cost of $2,000 a ton that it determined to be "cost-effective". The level of emissions reductions achievable at that average cost became - de facto - the maximum level of NOx that a source could emit without violating the CAA. Thus, EPA used this byzantine construct, built on a cost analysis, to define what interstate ozone-forming NOx emissions are allowable under the NAAQS.

As the D.C. Circuit observed in *Michigan v. EPA*, "the ultimate line of 'significance,' [for purposes of determining a 'significant contributor' under 42 U.S.C. § 7410(a)(2)(D)(i)(I)] whether measured in the volume of NOx emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs." *Michigan*, 2000 U.S. App LEXIS 3209, at *26. The ultimate effect of this use of cost by the Agency was, as the D.C. Circuit explained, "that, after reduction of all that could be cost-effectively eliminated, any

remaining 'contribution' would not be considered 'significant'..." *Id.* at *33. In recognizing that cost was necessarily integral to the Agency's decision-making, the D.C. Circuit rejected challenges to the Agency's consideration of costs. The Court reasoned:

> Petitioners conspicuously fail to describe the intellectual process by which EPA would determine "significance" if it may consider only health. EPA has determined that ozone has some adverse health effects - however slight - at every level. Without consideration of cost it is hard to see why any ozone-creating emissions should not be regarded as fatally "significant" under § 110(a)(2)(D)(i)(I).

Id. at *35 (citation omitted).

The Court bolstered this conclusion by reference to other precedents in which it had construed similar language to permit consideration of cost, and commented that "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction." *Id.* at *38. The commonality among these cases as described by the D.C. Circuit was "[a] mandate directed to some environmental benefit [that] is phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), and contains not a word alluding to non-health tradeoffs; in each case we found that in making judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit." *Id.* at *39. Implicit in the interpretive principle extracted by the Court that costs may be considered unless expressly precluded is the recognition that costs are integral to environmental

policymaking *as a practical matter*, and that the courts will not therefore lightly interpret a statute to reflect congressional intent to preclude consideration of costs.

The point here can be simply stated: costs and benefits *must* eventually be considered in setting air quality standards. The NOx SIP Rule demonstrates that EPA *does now* consider costs and benefits. The present NAAQS as interpreted by the DC Circuit in *Lead Industries disallows* cost consideration at the early stage of setting the standards. This opens the door for even broader discretion by the Agency, which must eventually confront the cost/benefit issue, to find another point in the regulatory process to consider costs. In the NOx Rule, *that* point was transferred to the point of defining the maximum amount of NOx a source type in one state can emit into another state without violating the CAA. Cost/benefit analysis in *Michigan* clearly drove the "health" decision for allowable levels of ozone emissions that may be transported state-to-state. That approach was fully embraced by the DC Circuit in *Michigan v. EPA*.

A similar result can be seen in the D.C. Circuit's decision in *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). In *NRDC*, the D.C. Circuit was construing § 112 of the Act, 42 U.S.C. § 7412, which provides in relevant part that the Agency must set the emissions standard under § 112 "at the level which in his judgment provides an ample margin of safety to protect the public health." In *NRDC*, the EPA stated its interpretation of its duty under § 112 as "requir[ing] emissions reductions to the lowest level achievable by use of the best available control technology in cases involving non-threshold pollutants, where complete emission prohibition would result in widespread industry closure and EPA has determined that the cost of such

closure would be grossly disproportionate to the benefits of removing the risk..." *Id.* at 1148 (*quoting* 52 Fed. Reg. 59,532, 59,534 (1975)). The Court held that EPA's determination of what is "safe" must be based solely on health risks, but that cost and technological feasibility could be considered later in determining what constitutes an "ample margin" of safety. *Id.* at 1165. The "two-step" analysis performed by the Court in *NRDC* again reflects the reality that where cost considerations are precluded at one level of the rulemaking process, they will appear at another stage of the regulatory process.

Therefore, to say that cost/benefit considerations are disallowed when setting NAAQS is to ignore the realities of CAA implementation. In the case of ozone, even if cost were not considered when revising the ozone NAAQS as a threshold matter, cost played a pivotal role later when EPA set acceptable levels of NOx emissions that are allegedly transported into other states. While the ozone NAAQS and the ozone transport questions in the NOx SIP rule may appear unrelated, they are actually closely related. The NAAQS Rule under consideration in the present case identifies an ozone emission limit for source types, beyond which point emissions violate the NAAQS. The NOx SIP Rule identifies an ozone emission limit for source types statewide, beyond which point emissions are presumed to be transported and "contribute significantly" to other states' violation of NAAQS. CAA § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D); *see generally*, *Michigan v. EPA*, *supra*. Taken to their practical ends, whether promulgated under § 108 or § 110(a)(2)(D), each ozone rule establishes an emissions limit that requires stationary sources to change operations or retrofit facilities with control equipment to meet the new standards. Costs are incurred, either way.

Delaying cost evaluation in this fashion results in an overly broad grant of discretion to the agency. First, the agency selects the point at which costs are considered, which allows the Agency to "game" the system. The Agency can choose points on the economic curve to suit its purpose, irrespective of actual impacts. Second, the Agency may transmute cost into something other than it is, dealing with it inconspicuously. In NOx SIP rule, EPA buried cost beneath a complex construct, with a defined level of alleged interstate emissions serving as the pretext for requiring cost-driven emission reductions. The D.C. Circuit upheld EPA's use of "cost-effective reductions" to define "significant contribution." Amicus does not challenge that finding here, but merely highlights the fact that costs were the fulcrum for identifying the allowable statewide ozone-forming NOx emissions level in that case.

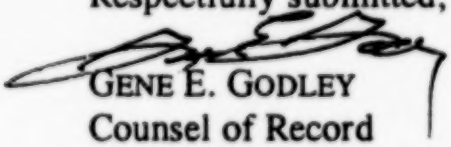
The regulatory cost of NAAQS must be -- and is -- eventually confronted. As demonstrated in *NOx SIP*, cost consideration may be deferred for a later regulatory moment and obscured in a fashion that does not shine a spotlight on cost as a factor in a health-based standard.

EPA has reluctantly come to learn what the regulated community has always known: cost and technological feasibility are factors in determining what level of regulatory control can reasonably be demanded by society. Amicus believes the Clean Air Act is better interpreted if this consideration of those factors occurs in an open and honest environment, and not when held hostage to inscrutable risk assessment or regulatory hijinks.

CONCLUSION

For all the foregoing reasons, this Court should reverse the lower court judgment that NAAQS revisions under § 109 of the CAA must be made without consideration of costs and other impacts.

Respectfully submitted,



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